



**U.S. Department of  
Transportation**  
Office of the Secretary  
of Transportation

**General Counsel**

1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

February 8, 2016

**FILED ELECTRONICALLY**

Ms. Cynthia Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

240037

ENTERED  
Office of Proceedings  
February 8, 2016  
Part of  
Public Record

**Re: Docket No. EP 726  
On-Time Performance Under Section 213 Of The  
Passenger Rail Investment and Improvement Act of 2008**

Dear Ms. Brown:

Please find attached for filing in the above-referenced proceeding the Opening Comments of the United States Department of Transportation (DOT), signed by the General Counsel, Kathryn B. Thomson. If you have any questions, please feel free to contact me.

Respectfully,

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**WASHINGTON, D.C.**

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**On-Time Performance Under Section 213  
Of The Passenger Rail Investment And  
Improvement Act of 2008**

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**No. EP 726**

**OPENING COMMENTS OF THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION**

Pursuant to the Board's Notice of Proposed Rulemaking served on December 28, 2015 (NPRM), the United States Department of Transportation (Department or DOT) and Federal Railroad Administration (FRA), an operating administration of DOT, respectfully submit their opening comments in this matter. The Department is pleased to have the opportunity to share its views on the issues raised in this proceeding, particularly given the importance of the Board's proposal for the passenger rail system and the rail network as a whole.

As the Board points out, Congress enacted measures in the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) aimed at enhancing the performance of the National Railroad Passenger Corporation (Amtrak). Pub. L. No. 110-432, Div. B, 122 Stat. 4907 (2008). Among other things, Congress was attentive to how Amtrak delays may result from the operations of host freight railroads, which are required by statute to provide "preference" to Amtrak. 49 U.S.C. § 24308(c).<sup>1</sup> Under section 207 of PRIIA, Amtrak and FRA were given the

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<sup>1</sup> In a related proceeding, the Board has published for comment a proposed Policy Statement on how "preference" should be defined. STB No. EP 728, *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)* (served Dec. 28, 2015). The Department is considering the submission of its views in that proceeding as well.

responsibility to “jointly . . . develop” metrics and standards for the performance of intercity passenger rail, “in consultation with” the Board and other stakeholders. 49 U.S.C. § 24101 note. Litigation ensued over the constitutionality of section 207 of PRIIA, with the Association of American Railroads (AAR) contending that this provision unlawfully delegated power to Amtrak. The Supreme Court ultimately concluded that Amtrak is a governmental entity for purposes of determining the validity of the metrics and standards, and remanded the case for further consideration of other arguments about the constitutionality of this provision. *Dep’t of Transportation v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225 (2015). At present, that case remains pending before the United States Court of Appeals for the District of Columbia Circuit.

In addition to those metrics and standards, under section 213 of PRIIA, “[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters,” the Board “may initiate an investigation,” or Amtrak or other specified parties may file a complaint asking the Board to investigate. 49 U.S.C. § 24308(f)(1). In so doing, the Board must determine the causes of the delays, as well as whether they “are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required” by law. *Id.* § 24308(f)(2). In that case, the Board may order the host railroad to pay damages, or may fashion other appropriate relief. *Id.*

In the NPRM, for purposes of implementing section 213 of PRIIA, the Board proposes to adopt a definition of on-time performance drawn from one previously used by the Interstate Commerce Commission (ICC), under which “a train is deemed to be ‘on time’ if it arrives at its final destination within five minutes of its scheduled arrival time per one hundred miles of operation (capped at 30 minutes).” NPRM at 5; Appx. § 1040.2. The Board has also set forth a Table of Maximum Allowances corresponding to this definition. NPRM at 5; Appx. § 1040.3.

This methodology, the Board reasons, has the advantage of being “clear and relatively easy to apply,” and it “would simplify the record-keeping and production of evidence that may otherwise be necessary for Amtrak and the host carriers if” another definition were used. NPRM at 6.

DOT has a significant interest in this proceeding, as we seek to foster railroad “policies and programs that contribute to providing fast, safe, efficient, and convenient transportation” for the benefit of our nation and its economy. 49 U.S.C. § 101(a). Amtrak plays a critical role in achieving this goal. In enacting PRIIA, Congress recognized the importance of Amtrak to our nation’s system of transportation, and adopted measures to improve Amtrak’s performance. DOT supports Amtrak’s ongoing efforts to enhance passenger rail service and to ensure that Amtrak is afforded the preference that Congress established by statute.

In addition, DOT recognizes that the issues raised in this proceeding have effects beyond the passenger rail network itself, and it is important to keep the freight rail system fluid and efficient. Freight rail customers also depend upon this network, and as DOT has explained in other proceedings before the Board, service disruptions in the freight system can have cascading effects upon the rail network as a whole, including passenger rail. In certain instances, such disruptions can also adversely affect safety, as railroads and shippers seek to make up for delays or overcome other obstacles, like extreme weather. *See, e.g., Reply Comments of the United States Department of Transportation* at 2, STB No. EP 724-4, United States Rail Service Issues, Performance Data Reporting (filed Apr. 29, 2015) (discussing the challenges of keeping the rail network in “equilibrium”).

DOT appreciates the Board’s efforts to consider these issues and to reach a conclusion that best comports with Congress’s intent. At the outset, although DOT understands the challenges inherent in any effort to define on-time performance, it is our view that the Board’s

proposed definition may be improved by a more robust consideration of additional factors beyond the time of arrival at the train's final terminus. As the Board points out, such a measure has the benefit of clarity, but it may not sufficiently take into account the interests of Amtrak or its passengers. For example, the Board recognizes that one alternative may be to "factor[] into the calculation of on-time performance a train's punctuality at intermediate stops, rather than the final terminus only." NPRM at 6. In DOT's view, it would be appropriate to consider that alternative in more depth. As FRA noted in a Quarterly On-Time Performance Report to Congress, "[m]ost passengers on a typical Amtrak route are not traveling exclusively between the route's endpoints; for example, the *Southwest Chief* serves 33 stations that can be combined into over 500 city-pairs." See Letter and Attachments from Admin. Joseph H. Boardman to Hon. Robert C. Byrd at 3 (July 14, 2008), available at <http://www.fra.dot.gov/eLib/details/L04067> (last visited Feb. 8, 2016). "Thus, the endpoint percent on time statistic is not necessarily representative of the punctuality or tardiness actually experienced by most of a route's passengers." *Id.* FRA therefore noted that "[o]ne option for providing greater insight on train performance over the course of an entire route is to calculate the percent on time based on arrivals and departures at all stations, not just the endpoints." *Id.*

Furthermore, depending on the configuration of a route and its stops, a train may be able to make up time during the final portions of its overall journey, which may lessen the delay in arriving at the final terminus. In some cases, that may mean that a train would be deemed "on time," even if passengers at intermediate stops experienced delays along the route. Such considerations should bear upon the Board's determinations about Amtrak's performance, and about how best to serve railroad passengers.<sup>2</sup>

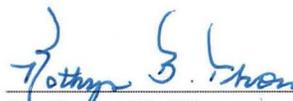
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<sup>2</sup> FRA has been publishing Amtrak's All Stations OTP, the percentage of arrivals at all of a route's stations that take place within 15 minutes of the schedule, since the 2010 establishment of the Metrics and

Finally, DOT recognizes that the Board may raise additional questions about Amtrak's schedules. *See, e.g.*, Letter of Jan. 19, 2016 from Norfolk Southern Corp. at 2 (questioning whether Amtrak's schedules constitute the appropriate "standard" by which to measure performance). Given the importance of this proceeding, it is appropriate for the Board to delve further into these questions and to obtain more information, with the understanding that simply lengthening schedules for the purpose of improving OTP may not be in the public interest. DOT will continue to consider this and other issues raised in this proceeding, and looks forward to hearing the views of Amtrak, freight railroads, shippers, and other interested parties. We may offer further views at a later stage of this proceeding if appropriate.

February 8, 2016

Respectfully submitted,



**Kathryn B. Thomson**  
General Counsel  
United States Department of Transportation